A

LIM HONG BEE

v.

MAH TECK OON

B

HIGH COURT MALAYA, KUALA LUMPUR
SURAYA OTHMAN J
[DIVORCE PETITION NO: S8-33-434-1984]
15 JANUARY 2010

C ***FAMILY LAW:*** *Divorce - Maintenance - Application by husband seeking release or discharge from paying any maintenance to wife - Variation of consent decree nisi order - Material change in circumstances - Whether proven - Law Reform (Marriage and Divorce) Act 1976, s. 84*

D ***FAMILY LAW:*** *Maintenance - Wife - Application by husband seeking release or discharge from paying any maintenance to wife - Variation of consent decree nisi order - Material change in circumstances - Whether proven - Law Reform (Marriage and Divorce) Act 1976, s. 84*

E ***CIVIL PROCEDURE:*** *Consent order - Variation - Application by husband seeking release or discharge from paying any maintenance to wife - Material change in circumstances - Whether proven - Law Reform (Marriage and Divorce) Act 1976, s. 84*

F This was an application by the respondent husband praying, *inter alia*, for an order that he be released or discharged from paying any maintenance (from October 2007) to the petitioner wife under the consent order of court dated 27 February 1985. In seeking said order, the husband submitted, *inter alia*, the following grounds: (i) having retired, he was thereby under no obligation to comply with G the consent order dated 27 February 1985; (ii) that his wife was employed and capable of maintaining herself and, thus, did not require any maintenance from him; and (iii) that he had remarried and was entitled to be discharged from paying maintenance.

H **Held (dismissing the application with costs):**

(1) Under s. 84 of the Law Reform (Marriage and Divorce) Act 1976 ('Act'), there must be a material change in the circumstances in order for the court to vary the terms of any agreement for maintenance made between husband and wife. I Retirement and remarriage *per se* do not constitute a material

change in circumstances if the applicant cannot show that he is financially adversely affected or suffers a financial detriment as a result thereof. The court will not intervene to vary or discharge the maintenance payment, especially one which emanates from a mutual consent order, unless satisfied that the applicant is incapable of paying due to the adverse change in circumstances. In this instance, the husband had affirmed in his affidavit his monthly expenses but failed to make any disclosure of his property and income. As such, the husband had not discharged, on a balance of probabilities, his burden to show that there had been any material change in circumstances as envisaged under s. 84 of the Act to justify a variation of the consent *decree nisi* order dated 27 February 1985. *Chua Chwee Thiam v. Annie Lim* (refd); *Santha Devi Thuraisingam v. A Shanmuganathan* (refd); *Lau Hui Sing v. Wong Chou Yong* (foll).

Case(s) referred to:

Amrick Lall v. Sowbaiavati [1973] 1 LNS 3 HC ***(refd)***

Choong Yee Fong v. Ooi Seng Keat; Chua Chong Hong (Joint Respondent) [2006] 5 CLJ 144 HC ***(refd)***

Chua Chwee Thiam v. Annie Lim [1989] 2 CLJ 535; [1989] 2 CLJ (Rep) 896 HC ***(refd)***

Gisela Gertrud Abe v. Tan Wee Kiat [1986] 2 CLJ 202; [1986] CLJ (Rep) 133 SC ***(refd)***

Koay Cheng Eng v. Linda Herawati Santoso [2008] 4 CLJ 105 CA ***(refd)***

Lau Hui Sing v. Wong Chou Yong [2008] 9 CLJ 232 HC ***(foll)***

Santha Devi Thuraisingam v. A Shanmuganathan [1990] 1 CLJ 988; [1990] 3 CLJ (Rep) 47 HC ***(refd)***

Legislation referred to:

Divorce and Matrimonial Proceedings Rules 1980, r. 63(1)

Evidence Act 1950, s. 114(g)

Law Reform (Marriage and Divorce) Act 1976, ss. 82(2), 84

For the petitioner - Velvashini (Jayne Siau Chui Bing with him); M/s KE Ooi & Partners

For the respondent - Loo Chay Meng; M/s Abu Hassan & Assoc

Reported by Suresh Nathan

A

JUDGMENT

Suraya Othman J:

Introduction

B **[1]** This is an application by the respondent husband by way of summons in chamber in encl. (32) praying for the orders as follows:

(1) that the respondent is released or discharged from paying any maintenance from October 2007 to the wife under the consent
C order of court dated 27 February 1985;

(2) that cost of the application is borne by both parties; and

(3) other reliefs this court deems fit.

D **[2]** The respondent husband in his application laid down the grounds for his application which are among others:

(i) that the respondent husband has obtained the age of 55 and has retired and thereby there is no obligation on his part to
E comply with the consent *decree nisi* order dated 27 February 1985;

(ii) that the petitioner wife is employed and capable of maintaining herself and therefore does not require any maintenance;

F (iii) that the respondent husband has remarried and is entitled to be discharged from paying maintenance; and

(iv) that there is material change in circumstances in this case.

Factual Background

G

[3] From the pleadings adduced by both parties in this court, the facts of this case are as follows:

[4] The respondent husband and petitioner wife obtained a decree
H for divorce by consent on 27 February 1985. The material term for the said consent order is for the husband to pay the sum of RM300 per month as maintenance to the petitioner wife. The rate of payment is further to be increased annually at 8% per annum.

[5] The respondent husband had agreed to record the consent
I order with the advice of his solicitors. The said payment is to be paid to the petitioner wife without a cut off period.

[6] From November 2007 onwards, the husband without seeking and obtaining any order from the court, unilaterally decided to stop making any payments towards the maintenance of the wife. Numerous letters and reminders were sent to the husband reminding him to make the said payments that were due but the reminders were ignored by the husband.

[7] Due to the husband's defiance of the said consent *decree nisi* order, the wife instituted committal proceedings against the husband which was filed *vide* encl. 28.

[8] Upon being served with the committal papers, the husband filed this application to be released or discharged from the consent order dated 27 February 1985

Respondent Husband's Submission

[9] In seeking the order to be discharged from the consent order dated 27 February 1985, counsel for the husband, Mr Loo Chay Meng submitted that on 5 November 2007 the husband attained the age of 55 and accordingly retired. Thus the retirement is a material change in circumstances and he should be automatically released from paying further maintenance under the consent order dated 27 February 1985.

[10] Mr Loo Chay Meng also submitted that the wife is capable of maintaining herself and therefore does not require any maintenance from the husband. Mr Loo referred to the case of *Choong Yee Fong v. Ooi Seng Keat, Chua Chong Hong (Joint Respondent)* [2006] 5 CLJ 144 which stated:

> The petitioner had the means within the contemplation of section 78 of the Act, to be self-sufficient and self-reliant to which her claim for maintenance to support herself must necessarily fail.

[11] Mr Loo further submitted that the husband has remarried and therefore is entitled to be discharged from paying maintenance. He referred to the case of *Gisela Gertrud Abe v. Tan Wee Kiat* [1986] 2 CLJ 202; [1986] CLJ (Rep) 133 and the case of *Amrick Lall v. Sowbaiavati* [1973] 1 LNS 3 to support his contention.

Petitioner Wife's Submission

[12] Counsels for the petitioner wife, Ms Velvashini and Ms Siau Chui Bing argued that it is clear from the express term of the *decree nisi* that the reasons of retirement and remarriage are clearly unjustifiable.

[13] They also submitted that the husband has not been truthful about his income as he has filed an affidavit of means without any supporting documents and made only bare allegation that he has no means to pay the maintenance. Therefore he has failed to make full and frank disclosure of his income and assets and as such s. 114(g) of the Evidence Act 1950 applies to attract an adverse inference against him. In this regard, they referred to the case of *Koay Cheng Eng v. Linda Herawati Santoso* [2008] 4 CLJ 105.

[14] Counsels for petitioner wife further submitted the case of *Lau Hui Sing v. Wong Chou Yong* [2008] 9 CLJ 232 which stated:

> … a consent order even in a divorce matter must be rarely disturbed unless there are exceptional circumstances and that too clearly stated in the affidavit to warrant the intervention of the court.

[15] Further, Ms Velvashini contended that the maintenance is crucial to the wife as she has been struck down with cancer and is without any fixed source of income.

Decision Of Court

[16] The law applicable for courts to vary agreements for maintenance is found in s. 84 of the Law Reform (Marriage and Divorce) Act 1976 (Act 164) ("LRA 1976") which states:

> **84. Power for court to vary agreement for maintenance**
>
> Subject to section 80, the court may at any time and from time to time vary the terms of any agreement as to maintenance made between husband and wife, whether made before or after the appointed date, **where it is satisfied that there has been any material change in the circumstances** and notwithstanding any provision to the contrary in any such agreement.

[17] This section refers to the power of the court to vary any subsisting agreements for maintenance, and therefore so long as it is a subsisting agreement for maintenance the court has a discretion to vary it in the circumstances described in the section. The meaning of the section is plain and very clear. It is apparent that under s. 84 of the LRA 1976 there must be a material change in the circumstance in order for the court to vary any agreements for maintenance. The section says any "material change" and not simply "change". There is no uncertainty or ambiguity whatsoever. It means a change in a crucial and vital part. In considering

whether there has been any "material change" within the meaning of this section all the relevant circumstances must be taken into account.

[18] The next question to be determined is whether there indeed has been any material change in the circumstances. The husband has given two reasons why he contended there has been material changes in circumstances since the consent order of 27 February 1985 was made. It is an established principle that the husband carries the evidential burden of satisfying this court, on a balance of probabilities, that there have been material changes in circumstances.

[19] The husband contended that his income has reduced significantly on two grounds that firstly he is now retired and secondly he has remarried. This court is unable to accept his contention that these two grounds automatically constitute material changes in circumstances. To constitute material change in circumstances he has to disclose evidence to support his contention that he has suffered a financial detriment as a result of his retirement and remarriage which necessitates this court's intervention to vary or discharge the maintenance payment to the wife. In this respect, r. 63(1) of the Divorce and Matrimonial Proceedings Rules 1980 (the 1980 Rules) is relevant. Rule 63(1) provides:

> 63. (1) An application for a variation order shall be supported by an affidavit by the applicant **setting out full particulars of his property and income** and the grounds on which the application is made.

[20] In this instant case, the husband has not exhibited relevant documents to support his contention that his earnings has reduced significantly. The only document he has exhibited in his affidavit which was affirmed on 10 February 2009, is the letter dated 3 December 2007 confirming that he has retired from the position of Chief Executive Officer (CEO) and Managing Director (MD) of ICP Berhad on 5 November 2007 (exh. "MTO1", encl. 34). The husband has failed to disclose his full monthly income and the market value of all his property. His affidavit which was affirmed on 19 Jun 2009 (encl. 41) only averred to his monthly expenses and did not make any disclosure of his property and income. As a result, this court makes a finding that he has failed to set out full

particulars of his property and income within the meaning of r. 63(1) of the 1980 Rules. He has also failed to disclose his earnings capacity and other available capital resources.

[21] This court is also guided by the case of *Chua Chwee Thiam v. Annie Lim* [1989] 2 CLJ 535; [1989] 2 CLJ (Rep) 896. In this case, the husband and wife had entered into an agreement on 20 March 1982 to make financial arrangements for the wife. On 4 June 1987 the husband applied to revoke the financial arrangements on the grounds that he was 'financially stretched', alleging that at the time he signed the agreement his business was doing well, but since then he had suffered setback and his company was in dire financial straits. In his affidavit, the husband gave evidence and exhibited his company's debt and that his company was placed in receivership. In the circumstances disclosed in that case, the court was satisfied that the husband had produced enough evidence to show that there was a material adverse change in the husband's financial circumstances and granted his application. In doing so the court also took into account that the wife was well-off, owning two properties and expensive cars. In short, these case points out the type of information the husband/applicant should make available to the court in an application of this nature. As regard to this instant case before this court, in contrary, the husband has not made any real attempts to disclose to this court all relevant information regarding his present financial status.

[22] With regard to the husband's contention that he has remarried and therefore is entitled to be discharged from paying any maintenance, this court of the view that the husband's remarriage does not constitute a material change in circumstances for the reason that the parties had already taken such a circumstance into account when they entered into an agreement for a joint petition. It must be noted that there is no provision found in the agreement which expressly states that if the husband remarries then he will be discharged from paying maintenance to the wife. It is also important to note that s. 82(2) of the Act is relevant to this issue. The section states:

82. Right to maintenance to cease on marriage

(1) The right of any divorced person to receive maintenance from his or her former spouse under any order of court shall cease on his or her marriage to or living in adultery with any other person

(2) The right of any divorced person to receive maintenance from his or her former spouse under an agreement shall cease on his or her marriage to or living in adultery with any other person unless the agreement otherwise provides.

[23] This section clearly states that the right of the wife to receive maintenance from her former husband under an order of court or an agreement shall cease on her marriage to or living in adultery with any other person. It does not state that the maintenance would cease upon the husband's marriage to another person. The obligation to pay remains with the person making the payment until the receiver of the payment gets married and not *vice versa*. Thus the maintenance to the wife shall not cease automatically immediately on the husband's remarriage.

[24] Further, it is this court's view that even if the wife seems to be a person of means, that by itself does not assist the husband's case as he still has to show his inability to pay maintenance to her due to his retirement and remarriage; in other words he is financially adversely affected or in dire financial straits due to these two factors. On the other hand, the wife who has been struck down with cancer will need all the financial assistance she can get to help pay for her treatment and medication. Without any fixed source of income, the regular and uninterrupted payment of maintenance by her former husband is crucial to her and this court will not and should not intervene to vary or discharge this maintenance payment on a mere averment by the husband that he cannot pay.

[25] Here, this court would like to refer to the case of *Santha Devi Thuraisingam v. A. Shanmuganathan* [1990] 1 CLJ 988; [1990] 3 CLJ (Rep) 47, where Lim Beng Choon J stated:

In the ultimate analysis, my conclusion is that there is a change of circumstances in respect of the husband's position from the date of his dismissal by his employer Agricultural Enterprises on 28 February 1989. However the change in the circumstances does not to my mind justify any suggestion that the husband is totally incapable to pay maintenance. A proper consideration of the husband's case does not reveal a total inability on the part of the husband to pay maintenance. His refusal to pay maintenance is not due to his inability to do so but rather from his deliberate refusal to do so simply because he was and still is under the impression that the wife does not deserve maintenance and because she has the resources to maintain herself and the three children.

[26] This court also agrees with the views expressed by Dr Hamid Sultan JC (as he then was) in the case of *Lau Hui Sing v. Wong Chou Yong (supra)*:

> As a general rule, a consent order even in a divorce matter must be rarely disturbed unless there are exceptional circumstances and that too clearly stated in the affidavit to warrant the intervention of the court ...

Conclusion

[27] To sum it up, retirement and remarriage *per se* does not constitute material change in circumstances if the applicant cannot show that he is financially adversely affected or suffers a financial detriment as a result of it. The court will not intervene to vary or discharge the maintenance payment, especially one which emanates from a mutual consent order unless satisfied that the applicant is incapable of paying due to the adverse change in circumstances. In this case the husband has affirmed in his affidavit his monthly expenses but failed to make any disclosure of his property and income. As such this court finds that the respondent husband has not discharged, on a balance of probabilities, his burden to show that there has been any material change in circumstances as envisaged under s. 84 LRA 1976 to justify a variation of the consent *decree nisi* order dated 27 February 1985.

[28] In the circumstances this court dismisses the respondent husband's application with costs.

[29] Application dismissed with costs.